86-603

No. 86-_____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HELEN ABELS, *et al.*,

Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

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61 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHEN A UNION SUES A DISSENTING NON-MEMBER TO COLLECT AN UNPAID REPRESENTATION FEE, IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:

   A. A Pro Rata Share Of The Proven Costs Of Collective Bargaining; Or

   B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

II. DOES THE FIRST AMENDMENT PERMIT A COURT TO ENTER JUDGMENT FOR AFFILIATION FEES IN A SUIT TO COLLECT THE REPRESENTATION FEE WHEN THE UNION HAS PRESENTED NO EVIDENCE OF ACTUAL EXPENDITURES FOR SERVICES PROVIDED TO THE DISSENTERS' BARGAINING UNIT BY THE STATE AND NATIONAL AFFILIATES?

LIST OF PARTIES

In addition to the parties named in the caption the following individuals are petitioners: Scott Ackerson, Francita Agostino, Stephen Bailey, David Barber, N. Imogene Black, Daniel Bopp, Robert Courtney, Victoria Drummond, Margaret Duvall, Graydon Estabrook, Joy Etcheson, Larry Galyan, Pamela Gilliatt, Joseph R. Hamros, Susanne Haverstock, Connee Headley, Rita Hefron, Julie Hennessy, Helen Hollingsworth, Ethel Hooten, Robert Houts, Nancy Huffman, Lynn Janasiewicz, Deborah Jewell, Eleanor Jones, Teresa Kinder, Beverly Klein, Richard Lee, Nancy Lumbley, William Lumbley, Shirley Mahan, Doris Mathews, Ida Medlyn, John Memering, Wayne Nichols, Steven Nicola, Sigrid Phillipoff, Kathleen Rabold, Eva Rambo, Janet Rowland, Margaret Samudio, Sue Shiffrin, Dorothy Spore, Anne Summers, Letha Taylor, Joan Travis, Emmelyn Watts, Debra Weber, Barbara Willsey, Rebecca Wilson, David Witcher, Linda Woods, and Sharon York.

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No. 86-_____

IN THE

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OCTOBER TERM, 1986

HELEN ABELS, *et al.*,

Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

REFERENCE TO RULINGS

The decision of the Indiana Court of Appeals is reported at 489 N.E.2d 533. It is reproduced in the Appendix at page 1a. The order of the Indiana Court of Appeals denying rehearing is reported at 490 N.E.2d 775. It is reproduced in the Appendix at page 25a. The order of the Supreme Court of Indiana denying the petition to transfer the cause to that court is unpublished. It is included in the Appendix at page 27a. The decision of the Superior Court is unpublished and it is included in the Appendix at page 19a.

JURISDICTION

The judgment of the Indiana Court of Appeals is dated February 18, 1986. Appendix, page 1a. Petitioners'

petition for rehearing was denied by that court on March 31, 1986. Appendix, page 25a. Their timely petition to transfer the cause to the Supreme Court of Indiana was denied by that court on July 14, 1986. Appendix, page 27a. This petition will be filed within 90 days of that date.

This Court has jurisdiction by virtue of 28 U.S.C. § 1257(3). Because the Supreme Court of Indiana denied the petitioners' motion to transfer the cause to that court, the Court of Appeals is the highest court of Indiana in which a decision could be had. *See*, *Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(3) "where any title, right, privilege or immunity is specially set up or claimed under the Constitution." As shown below, petitioners' defenses throughout the Indiana proceedings were based on their rights, privileges and immunities under the Constitution of the United States. Therefore, this Court has jurisdiction to review the judgment below by writ of certiorari. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 378 U.S. 540 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Monroe County Community School Corporation (Corporation) and the Monroe County Education Association (MCEA), pursuant to the obligations imposed by I.C. 20-7.5-1-1, *et seq.*, entered into a collective bargaining agreement covering the 1981-82 and 1982-83 school years of the Corporation. (Plaintiffs' Exhibit 1, hereinafter "P." followed by the number.) In this agreement the Corporation recognized MCEA as the exclusive representative of its certified employees as the term "exclusive representative" is defined by I.C. 20-7.5-1-2(1). (P. 1, Article 1.01, p.1, Transcript pages 176, 179, hereinafter "Tr. p. _____.") The petitioners (teachers) are certificated employees and were employed by the Corporation during all or portions of the period covered by the agreement. (Tr. pp. 380-381.)

The agreement provides for a representation fee as follows:

> Section 2—Representation fee
>
> a) All members of the bargaining unit who are not also members of the Association have an obligation to pay a Representation Fee to the Association, including the Indiana State Teachers Association and the National Education Association. The Representation Fee shall be the unified dues of the Associations less an amount determined by the procedures provided for in subsection c below.
>
> Deductions of the Representation Fee will be in

accord with Article 2.08, Section 1—Dues Deduction. (P. 1 p. 5)

* * * *

c) The Association recognizes that no member of the bargaining unit should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment, or unrelated to its duties as exclusive bargaining representatives. Consequently, the Association agrees to adopt an internal Association remedy providing for a pro rata refund of that portion of the Representation Fee which is unrelated. (P. 1 p. 5)

The teachers refused to pay any money to the MCEA, and the MCEA brought this action against them seeking to collect the amount alleged to be due. (Complaint, Par. 7, 8, 9 & Exhibit B, Tr. pp. 9 & 13; Answer, Par. 7, 8 & 9, Tr. pp. 29, 380-381.) The MCEA is affiliated with the Indiana State Teachers Association (hereinafter "ISTA"), a statewide organization, and the National Education Association (hereinafter "NEA"), a national organization, but neither of these organizations is the exclusive representative of the certificated school employees of the School Corporation. (Tr. pp. 179-180, 301.) During school year 1981-82 there were 597 members in the bargaining unit; 520 of those were members, and membership dues were $20.00. (Tr. p. 182.) During school year 1982-83 there were 537 members in the bargaining unit; 460 were members, and membership dues were $22.00. (Tr. p. 239, P. 2, Tr. pp. 183, 192.)

MCEA's expenses for the years in question as shown by its financial books and records (P. 3, 5, Tr. pp. 202, 204) are:

	Account	*1981-82*	*1982-83*
1.0	Board of Directors	$ 4,937.34	$ 5,919.13
2.0	Representative Council	3,276.88	2,231.00
3.0	Membership	844.15	397.23
4.0	Legislative Committee	106.68	56.75
5.0	PR Committee	0.00	23.70
6.0	Professional Development	56.00	40.00
7.0	Grievance Committee	0.00	0.00
8.0	Professional Negotiations	872.42	825.00
9.0	Social Committee	197.07	369.59
10.0	Human Relations	83.20	0.00
11.0	Legal Fees	1,772.16	585.67
	Total	$ 12,145.90	$ 10,448.07

Petitioners are not questioning here the $20.00 awarded to MCEA for 1981-82. For 1982-83 the total MCEA expenses were $10,448.07. Thus, under any circumstances, the MCEA fee for that year cannot exceed $19.46 ($10,448.07 divided by 537). The trial court awarded MCEA a fee equal to its local membership dues of $22.00. Appendix, page 21a.

The activities and organization of ISTA were related by Dale Harris (Tr. pp. 245-325), Larry Davis (Tr. pp. 325-343) and Don Shipley (Tr. pp. 378-380). However, this testimony and exhibits (P. 12-19) do not show what expenses ISTA incurred in assisting MCEA to perform its duties as the exclusive representative of these employees. *Id.*

Total chargeable expenses claimed by ISTA, number of members and number of employees represented were:

	1981-82	*1982-83*
Expenses	$ 5,138,335	$ 5,402,884
Members	35,392	34,571
Employees represented	52,918	52,490

(P. 18 & 19, Tr. pp. 250-251, 291.) Pro rata shares of the claimed expenses for a full-time teacher are respectively $97.10 ($5,138,335 divided by 52,918) and $102.93 ($5,402,884 divided by 52,490). The petitioners argued that the proof was inadequate to justify any fee for ISTA because no attempt was made to show the cost of services rendered to or on behalf of MCEA and that, even if there were, the maximum fees were pro rata shares of $97.10 and $102.93. The trial court awarded fees of $140.91 and $155.73[1] for ISTA based upon the union's dues-less-rebate calculation. Appendix, page 21a.

The fees claimed for NEA were $43.58 and $48.49. Membership figures in Indiana for NEA are the same as for ISTA. (Tr. p. 181.) The teachers made the same arguments with respect to NEA as they did with respect to ISTA. In their view no fee was due to NEA because of a failure of proof and, even if there were, the maximum fees were pro rata shares of $22.42 and $25.19. The trial court awarded dues-less-rebate fees of $43.58 and $48.49[1] for NEA. Appendix, page 22a.

Trial was held before the judge sitting without a jury on October 22 and 23, 1984. (Tr. p. 170.) The court took the matter under advisement and issued its decision on January 4, 1985, finding for the MCEA. (Tr. p. 504.) The teachers filed their Motion to Correct Errors on February 6, 1985. (Tr. pp. 1-6 & 507-512.) As stated therein:

---

[1] Fees for part-time teachers were one-half of these amounts.

The Court erred in finding that a representation fee may be based on dues *less* political and ideological activities unrelated to said costs. The proper measure of a representation fee is a pro rata share of the exclusive representative's costs of collective bargaining, contract administration and grievance adjustment and the performance of other statutory duties *vis-a-vis* the employer, not other government entities. If other organizations assist MCEA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than MCEA are not a recoverable expense.

* * *

In a suit-for-representation-fee case the measure of damages is not the amount of dues paid by a member; rather it is a pro rata share of the expenses incurred by the exclusive representative in performing its statutory duties. By finding that MCEA is entitled to $22.00 as its portion of the representation fee for 1982-83 the Court ignored uncontradicted evidence that the maximum permissible pro rata fee based upon MCEA's expenditures for the year is $17.50 per full-time and one half of that amount for each part-time defendant.

* * *

By finding that ISTA and NEA are entitled to a fee equal to membership dues less the amount of their self-determined rebate the Court failed to require the plaintiff to prove the amount those organiza-

> tions spent in assisting MCEA in performing its statutory duties as the exclusive representative in the Monroe County Community School Corporation. It is unlawful to charge the defendants with expenses incurred in lobbying any governmental agency other than the employer—here the Board of Trustees of the Monroe County Community School Corporation. The evidence in the record clearly shows that most of the activities of ISTA and NEA involve interaction with state and federal agencies other than the employer of the defendants. The costs of such activities are not chargeable to the defendants.
>
> * * *
>
> The Court's Conclusions of Law are erroneous in that any agreement which purports to authorize a representation fee in excess of a *pro rata* share of the plaintiff's costs necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the Monroe County Community School Corporation on labor-management issues is unconstitutional.

In their arguments to the Superior Court the petitioners cited and relied on this Court's agency fee cases, including: *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1960); and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). The trial court denied the Motion to Correct Errors on February 27, 1985.

In this petition the teachers are attacking only the method by which the fee for MCEA was calculated. They are abandoning their claim that certain of MCEA's

expenditures are not chargeable to them (but not their claim that certain expenditures of MCEA's state and national affiliates are non-chargeable). In the Court of Appeals the teachers made the same arguments and relied on the same cases as they had in the trial court. The constitutional argument presented was phrased as follows:

> The trial court's judgment is unconstitutional because the amount exceeds a pro rata share of plaintiffs' costs necessarily or reasonably incurred for the purpose of performing the duties of the exclusive representative of the defendants in dealing with the Monroe County Community School Corporation on labor-management issues.

The Court of Appeals rejected this argument, holding that:

> Appellants [*sic*] proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses.

Appendix, pages 10a-11a. The Court of Appeals affirmed the judgment of the trial court on February 18, 1986.

The teachers' required petition for rehearing was filed in the Court of Appeals on March 5, 1986. This Court decided *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S. Ct. 1066 (1986) on March 4, 1986. *Hudson* was filed with the Court of Appeals as a supplemental

authority along with a petition arguing that *Hudson* was inconsistent with the decision of the Court of Appeals. MCEA's motion to strike the supplemental petition was granted. The petition for rehearing was denied on March 31, 1986. In doing so the court ignored *Hudson*, stating:

> Appellants have not, either in the trial court or on appeal here, challenged the procedures employed by the Monroe County Education Ass'n. to collect the fair share representation fees. Rather their action attacked the actual calculation of the fair share representation fee due the union. *Chicago Teachers Union* does not address this issue. While this court is clearly bound to apply the constitutional limitations announced in *Chicago Teachers Union* where internal union procedures for the collection of fair share representation fees are challenged, that issue is not now before us. We need not, therefore, apply those limitations in this case.

Appendix, page 26a. Such reasoning completely misses the point. At all times and at all levels the teachers have maintained that the information furnished by the Union is insufficient to prove its case. *Hudson* is highly relevant to that issue.

On April 18, 1986, petitioners filed a timely petition to transfer the cause to the Supreme Court of Indiana for review. In their supporting brief they made the same constitutional arguments that had been made in the Court of Appeals. In their brief they argued that *Hudson* and the other agency fee decisions of this Court required review and reversal of the decision. The petition for transfer was denied on July 14, 1986. Appendix, page 27a. Thus, the Court of Appeals is the highest court of Indiana in which a decision could be had in this case and

28 U.S.C. § 1257(3) gives this Court jurisdiction to review that decision.

REASONS FOR ALLOWING THE WRIT

THE DECISION OF THE INDIANA COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT WHICH ARE *ABOOD*, *ELLIS* AND *HUDSON*.

A. The Method Of Calculation.

Abood, *Ellis* and *Hudson* mandate that an agency shop fee be based on the exclusive representative's costs of providing required services to the bargaining unit.

> The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

Abood, 431 U.S. at 225-26. In *Abood* the Court went on to approve the concept of agency shops for public employees. In doing so the Court pointed out that there will "be difficult problems in drawing lines between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236. The Court also pointed out that the remedy must prevent "compulsory subsidization of ideological activity" while at the same time permitting the

Union "to require every employee to contribute to the cost of collective bargaining activities." *Id.* at 237. It is *costs*, not dues, for which contributions can be compelled.

Ellis involved an agency shop for private sector employees, but the test of chargeability formulated therein is a constitutional one. 466 U.S. at 455. *Ellis* is a line-drawing case decided under the Railway Labor Act. There, the Court explained that the justification for union or agency shops is to eliminate the "free rider"—the employee whom the union is required to represent but who has refused to contribute to the cost of such representation. With respect to such contributions the Court said:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448. Again, it is *costs*, not dues, for which contributions can be compelled.

Hudson concerned the procedural protections which

must be in place before compelled contributions may be involuntarily deducted from a dissenting nonmember's salary. Nevertheless, it is precedent with regard to the questions presented here, because it requires that information with respect to expenditures be furnished to nonmembers, and disapproves of a fee calculated on a percentage of dues basis. *Hudson* makes clear that a fee may be compelled to collect for collective bargaining costs, not other expenses.

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

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[18]. We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U.S., at 122, 83 S.Ct. at 1163-1164, quoted in *Abood*, 431 U.S. at 239-240, n.40, 97 S.Ct. at 1801-1802 n.40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an

> item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n.4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Hudson, 106 S. Ct. at 1076.

The Indiana Court of Appeals was aware of *Hanson*, *Street*, *Allen*, *Abood* and *Ellis* when it made its decision, yet it determined that the dues paid by a member was the proper measure of damages in this case. On petition for rehearing, although the court was aware of *Hudson*, rehearing was denied. That this results in a glaring violation of teachers' First Amendment rights is best shown by the facts that a pro rata share of all union expenses for 1982-83 was $147.58 ($19.46 plus $102.93 plus $25.19) and the recovery permitted by the court below was $226.22 ($22.00 plus $155.73 plus $48.49), the amount of local dues less the union-determined rebate. The First Amendment violation is clear, as is the failure of the Indiana Court of Appeals to properly interpret and apply *Abood*, *Ellis* and *Hudson*.

The Indiana Court of Appeals reasoned thusly:

> Appellants [*sic*] proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of

> non-assessable expenses. *Allen*, at 121, 83 S. Ct. at 1163, 10 L.Ed.2d at 241; *Street*, at 774-75, 81 S. Ct. at 1803, 6 L.Ed.2d at 1164; *Stewart II*, Slip Op. at 6. The formulation was tacitly reaffirmed in *Ellis*. *See Ellis*, at _____, 104 S. Ct. at 1889-90, 80 L.Ed.2d at 439; *Stewart II*, Slip Op. at 6. Appellants' reliance on *Hudson v. Chicago Teachers Union* (7th Cir. 1984), 743 F.2d 1187, *cert. granted* (1985), _____ U.S. _____, 105 S. Ct. 2700, 88 L.Ed.2d 39, is misplaced. Nowhere in that opinion does the court suggest that appellants' proposed method of calculation is the appropriate one. *Stewart II*, Slip Op. at 6. If we were to adopt appellants' formulation, we would in effect be requiring the mathematical and accounting exactitude which the Supreme Court has ruled is neither to be required nor expected. *Ellis*, at _____, 104 S. Ct. at 1897, 80 L.Ed.2d at 447-48, n.15 *quoting Allen*, at 122, 83 S. Ct. at 1163, 10 L.Ed.2d at 241. *See also Stewart II*, Slip Op. at 6. Our own extensive review of the relevant authority reveals no support for appellants' proposed formulation.

Appendix, pages 10a-11a.

Such reasoning flies in the face of this Court's statement in *Ellis* that the Court's comments about remedy in *Street* and *Allen*, "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 466 U.S. at 443. The Court of Appeals' reasoning also is contrary to the holding in *Ellis*, 466 U.S. at 457 n.15 (emphasis added), "that the union bears the burden of what proportion of *expenditures* went to activities *that could be charged* to

dissenters" by "the preponderance standard normally applicable in civil suits for damages."

Moreover, the result reached is inconsistent with *Hudson*, because the Indiana court accepted the union's dues-less-rebate approach. *Hudson* specifically rejected proof of that nature as satisfying the notice required for First Amendment procedural due process:

> An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.

Hudson, 106 S. Ct. at 1076. The First Amendment requires that the union identify "the expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." *Id.* Surely a union that sues to collect a representation fee must show *no less* at trial before a court can enter a judgment depriving employees of their property. *See*, *Hudson*, 106 S. Ct. at 1074 n.13; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958).

B. The Evidence Is Inadequate To Show That ISTA And NEA Are Entitled To Any Fee.

If other organizations assist MCEA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives

other than MCEA are not expenses recoverable from these teachers.

The information provided at trial on behalf of ISTA and NEA is precisely of the same type determined by the Supreme Court to be inadequate in *Hudson*. If such information is inadequate to meet the procedural requirements of the First Amendment, it is also inadequate to meet the due process requirements of the Fourteenth Amendment. *See*, *Hudson*, 106 S. Ct. at 1074 and nn. 11 & 13. In this connection it must be remembered that it is the employees' First Amendment rights that are involved. Any state-authorized encroachment upon those rights must be narrowly drawn so as to be the least restrictive alternative accomplishing the governmental purpose involved. The purpose here is the elimination of the "free rider." That purpose is met by requiring payment for the Union's performance of its statutory duties "in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

By finding that ISTA and NEA are entitled to a fee equal to membership dues less the amount of their self-determined rebates, the Court of Appeals failed to require the plaintiff to prove the amount those organizations spent in assisting MCEA in performing its statutory duties as the exclusive representative in the Monroe County schools. The teachers contend that the vast majority of NEA's and ISTA's activities, political or otherwise, is not "related to collective bargaining" with the Corporation as this Court understood that concept in *Abood*. The plurality opinion in *Abood* held that, although collective bargaining in public-sector employment is itself a "political" activity, a state statute could require dissenting employees (such as the teachers here)

to associate with an exclusive representative (such as MCEA) for the purpose of bargaining.

And it went on to hold that certain other "political" activities "might be seen as an integral part of the bargaining process." 431 U.S. at 227-32, 236 (opinion of Stewart, J.).

The definition of "collective bargaining" used in *Abood*, though, was quite precise. The Michigan statute at issue itself defined "collective bargaining" as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement if requested by either party.

Mich. Comp. Laws § 423.215. And the *Abood* plurality reflected just such an understanding of collective bargaining—but no more. For example, the plurality referred to "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances"; by way of examples, it spoke of "the union's policy in negotiating a medical benefits plan," "a union policy of negotiating limits on the right to strike," "the union's wage policy," and "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination"; it wrote of "expenditures" and "service charges * * * applied to collective bargaining, contract administration, and grievance-adjustment pur-

poses"; and it distinguished from "collective-bargaining activities" those "social activities" that "fall outside the Union's duties as exclusive representative". 431 U.S. at 221, 225-26, 232, 236 n.33. Recognizing that successful "negotiating [of] a final agreement" might require "the approval of a higher executive authority or a legislative body," the plurality added that, "subsequent approval [of a written collective-bargaining agreement] by other public authorities" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 228, 236. Overall, then, the *Abood* plurality held that "collective bargaining" means: (i) negotiating an agreement with the public employer; (ii) where necessary, seeking the "approval of a higher executive or legislative body" to ratify or implement the agreement; (iii) administering the agreement—in short, performing the statutory duties of the exclusive representative.

Moreover, *Abood* makes clear that, with respect to a particular organization acting as an exclusive representative of particular public employees, "collective bargaining" refers only to those activities that the representative performs, pursuant to the applicable statute, *within the bargaining unit to which the employees belong*. The policy reasons that arguably justify compelling dissenting public employees to associate with a private organization as their exclusive representative rationally apply only to the unit in which those employees function—for only there does the representative have "great responsibilities" *relative to those employees*; only there may the representative's task "entail expenditures of much time and money," or even any time and money, ostensibly *on behalf of those employees*; only there will *those em-*

ployees possibly have "the incentive * * * to become 'free riders'"; only there is the representative "under a duty of fair representation" *to those employees*; only there will "confusion and conflict" *as to those employees' terms and conditions of employment* arguably be mitigated by collective negotiations; and only there will "labor peace" among those employees be served (if at all) by collective bargaining. *Id.* at 221, 222, 224. *See, Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 104 S. Ct. 1844, 1851 n.22 (1984); *Hammons v. Adams*, 783 F.2d 597, 604-05 (5th Cir. 1986); *Sine v. Local 992, IBT*, 730 F.2d 964, 966 (4th Cir. 1984).

Or, in sum, "collective bargaining" under *Abood* means negotiation and administration of an agreement concerning terms and conditions of employment for employees in the bargaining unit under consideration, and (where applicable) "political" activity that is "an integral part of the bargaining process" because it is necessary to ratify or implement the negotiated agreement. "Collective bargaining" for employees in unit *A*, then, does *not* include *any* activity the organization designated as their exclusive representative performs for employees in some separate units *B*, *C*, or *D*—even if that organization or one of its affiliates is also the representative in those units. Rather, with respect to the employees in unit *A*, the activities of the representative in units *B*, *C*, or *D* constitute "political activities '*unrelated* to collective bargaining'" because: (i) that other activity is "political," by definition; and (ii) it is not a part "of the bargaining process" in the relevant bargaining unit. The holding of the Supreme Court in *Ellis* is entirely consistent with and reinforces these conclusions.

Thus, in *Ellis* the Court approved litigation costs for

"disputes arising in the bargaining unit," "fair representation litigation arising within the unit," "any other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative," but excluded "the expenses of litigation not having such a connection with the bargaining unit." 466 U.S. at 453. Moreover, the general standard for chargeable costs adopted in *Ellis* limits them to activities directly tied to the union's performance of its statutory duties as "exclusive representative of the employees *in dealing with the employer* on labor-management issues" and "as exclusive representative of the employees *in the bargaining unit.*" *Id.* at 448 (emphasis added).

In *Hudson*, although it is not a line-drawing case, the Court concerned itself only with the income for higher levels of the organization generated by the exclusive representative. See note 18 to the opinion which is quoted above at page 13.

The teachers submit that, based upon the evidence in this record, neither ISTA nor NEA is entitled to any payment. First, it is clear that neither organization is the exclusive representative. (P. 1, Tr. pp. 176, 179-180.) Therefore, based upon *Ellis* the contract provision purporting to require payments equivalent to the dues less the self-determined rebate of these organizations is void and unenforceable. Second, assuming that some payment could be required, there is no showing in this record of any ISTA and NEA expenses that were incurred in assisting MCEA to perform its duties as the exclusive representative of these employees.

For example, there was testimony that bargaining by MCEA was supported by a UniServ office manned by a

Mr. Shipley and a secretary. (Tr. pp. 378-380.) This office also assisted other bargaining units. No effort was made at the trial to show the expenses of this office, such as salaries, rent, telephone and other expenses. (Tr. pp. 325-343.) No evidence was offered to show how much of the expenses of this office were spent in support of collective bargaining activity with the Corporation. (P. 12-19, Tr. pp. 245-343, 378-380.) Consequently, there is no proof that the cost of any UniServ activity is chargeable to the teachers.

The same is true of the other categories of expenses testified to by Mr. Harris, the Executive Director of ISTA (Tr. pp. 245-325), and Mr. Davis, the Business Manager. (Tr. pp. 325-343.) Take, for example, legal expenses. There is absolutely no evidence in the record that any legal expense was incurred by either ISTA or NEA as a result of processing any grievance arising out of the collective bargaining agreement with the Corporation. There was testimony that MCEA incurred some expenses in connection with its activities, and the teachers have not contested those expenses. (P. 3, 5, Tr. pp. 202, 204). However, if ISTA incurred any expenses in connection with those matters, they are not shown in this record.

With respect to NEA, that organization is even more remote from local labor-management relations than is ISTA. The only possible expenses it incurs that could be considered as chargeable are the UniServ rebates, here some $355,029.00 and $354,029.00. (P. 12, Tr. p. 253, p. 13, Tr. p. 272.) However, as with the ISTA UniServ program, there is no showing on this record that any portion of that rebate was expended in support of the exclusive representative in Monroe County.

Petitioners do not contend that amounts spent by ISTA and NEA in support of collective bargaining activities by MCEA are not chargeable to nonmembers. Indeed, they concede that, if proved, they could be charged a pro rata share of such costs. However, because MCEA presented no evidence of actual expenditures by its affiliates for the petitioners' bargaining unit, MCEA failed to carry its burden of proof and none of, *e.g.*, the $2,724,733.34 (P. 12 p. 3) and $2,762,732.42 (P. 13 p. 3) spent by ISTA on UniServ can be charged to the petitioners. ISTA's admission that it cannot charge nonmembers for $138,824.99 (P. 18) and $138,446.51 (P. 19) of its expenses does not prove that all of its other expenses are chargeable to nonmembers. *Hudson*, 106 S Ct. at 1076 n.18. Also, as shown above, membership dues less a rebate is not the proper way to calculate an agency fee. The proper way to calculate the amount of an agency fee is to determine the total chargeable costs and divide that figure by the number of people represented.

The teachers submit that in a case like this the exclusive representative must prove the costs entailed in providing collective bargaining services to the bargaining unit of which they are members. Costs incurred elsewhere or in servicing other bargaining units are not relevant to the inquiry. Once the chargeable costs are known, the fee is determined by dividing the costs by the number of people in the bargaining unit.

From all of the above, the teachers submit that the Court of Appeals erred in concluding that the MCEA was entitled to a judgment in excess of $39.46 ($20.00 plus $19.46) from each petitioner.

C. The Issues Raised In This Case Are Of Nationwide Importance.

As the Court well knows from its review of other cases, *e.g.*, *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. _____, 106 S. Ct. 1372 (1986); *Tierney v. City of Toledo*, 475 U.S. _____, 106 S. Ct. 1628 (1986), suits for service fees are quite common. In Indiana the only way a union can enforce collection of a fee from a dissenter is by a civil action for damages. *See*, *Alexander v. Anderson Federation of Teachers*, 416 N.E.2d 1327 (Ind. App. 1981) (agreement making payment of an agency fee a condition of employment is illegal under Indiana law). The result below and its companion case, *Stewart v. New Prairie Classroom Teachers Association*, 487 N.E.2d 533 (Ind. App. 1986), *petition for cert. filed*, 55 U.S.L.W. _____ (U.S. Oct. 6, 1986) (No. 86-554), set the precedent which has been and will be followed by other courts. As indicated by the membership figures, *supra* at page 6, in Indiana alone, the First Amendment rights of approximately 17,500 teachers are likely to be abused unless this Court reviews the judgment below and clearly articulates the proper rule that an agency fee must be based on a pro rata share of an exclusive representative's proven costs of collective bargaining on behalf of the dissenting employees' bargaining unit.

CONCLUSION

For the foregoing reasons the Court should grant this petition and set the case down for plenary briefing and argument.

Respectfully submitted,

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October 13, 1986

APPENDICES

APPENDIX A

DECISION OF THE COURT OF APPEALS OF INDIANA FIRST DISTRICT

February 18, 1986

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

HELEN ABELS, et al., Defendants-Appellants, vs. MONROE COUNTY EDUCATION ASSOCIATION, Plaintiff-Appellee.	No. 1-385 A 66
	Date filed: February 18, 1986

APPEAL FROM THE MONROE SUPERIOR COURT
The Honorable John G. Baker, Judge
Cause Nos. CV 8308-053 D, CV 8308-052 D

RATLIFF, J.

STATEMENT OF THE CASE

Appellants, non-member[1] certificated employees of the Monroe County Community School Corporation, appeal Findings of Fact and Conclusions of Law entered by the Monroe Superior Court on January 4, 1985, in favor of the appellee, Monroe County Education Association. We affirm.

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[1] In the context of this appeal, non-member refers to those teachers who belong to the bargaining unit but who have chosen not to join the exclusive representative.

FACTS

The Monroe County School Corporation (School Corporation) and the Monroe County Education Association (MCEA) entered into a collective bargaining agreement for the 1981-1982 and 1982-1983 school years. In part, that agreement provided for the payment of a fair share representation fee by the School Corporation's teachers who were not members of MCEA. The agreement stated:

"Section 2—Representation Fee

a) *All members of the bargaining unit who are not also members of the Association have an obligation to pay a Representation Fee to the Association, including the Indiana State Teachers Association and the National Education Association.* The Representation Fee shall be the unified dues of the Associations less an amount determined by the procedures provided for in subsection c below.

. . .

c) *The Association recognizes that no member of the bargaining unit should be forced to contribute financial support to political or ideological activities of the Association unrelated to the collective bargaining, contract administration, and grievance adjustment, or unrelated to its duties as exclusive bargaining representatives.* Consequently, the Association agrees to adopt an Internal Association remedy providing for a pro rata refund of that portion of the Representation Fee which is unrelated.

. . .

f) The provisions of Article 2.08, Section 2, will

> not be enforced against any person who initiates proceedings challenging the legality of this article, pending final disposition of such proceedings, except that the Representation Fee may be collected and the Representation Fee of the person will be held in escrow. [Emphasis added.]"

Record at 175. The validity of this clause was challenged in *Hollingsworth v. Monroe County Community School Corporation and Monroe County Education Association* (June 20, 1983), Brown Circuit Court, Cause No. 81 C 308, a class action brought by the appellants. There, on the basis of this court's opinion in *Fort Wayne Education Association v. Goetz* (1982), Ind. App., 443 N.E.2d 364, *trans. denied*, the Brown Circuit Court concluded that the challenged clause violated neither the United States nor Indiana constitutions. The court specifically withheld judgment on what amount was properly due under the representation fee clause however. Neither party appealed that judgment.

During the 1981-1982 school year, MCEA sought a total fair share representation fee of $204.49 from each full-time teacher who was not a member of the union. That amount included $20.00 for MCEA, $140.91 for the Indiana State Teachers Associations (ISTA), and $43.58 for the National Education Association (NEA).[2] For the

[2] These amounts reflect the dues each organization charges its members less a "rebate" for political, ideological, and organizational expenses unrelated to collective bargaining activities. MCEA's representation fee for the 1981-1982 school year is equal to the amount of dues paid by union members. It deducted nothing for political, ideological, or organizational expenses. ISTA, however, determined that $4.09 of their $145.00 dues was not chargeable to non-members. Likewise, NEA deducted $4.42 from its dues of $48.00 to reflect expenses not assessable against non-members.

1982-1983 school year, MCEA sought a representation fee of $226.22. This amount included $22.00 for MCEA, $155.73 for ISTA, and $48.49 for NEA.[3] The appellants, however, refused to pay any representation fees. Consequently, MCEA initiated this action to collect the fair share representation fee alleged to be due. Following a bench trial, the Monroe Superior Court found for MCEA and entered judgment against the appellants. Appellants subsequently perfected this appeal asserting a number of errors. We will develop additional facts below.

ISSUES

Appellants assert a number of issues in their briefs. Essentially, however, this appeal raises two issues:

1. Whether the trial court erred when it determined that the fair share representation fee could include payments to ISTA and NEA.

2. Whether the trial court correctly calculated the amount of the fair share representation fee.

DISCUSSION AND DECISION

Issue One

Although far from clear, appellants initially appear to assert that MCEA may not collect any representation fee for either ISTA or NEA. Their argument seems to be

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[3] The representation fee for MCEA once again equaled the amount of dues paid by members. Both ISTA and NEA, however, "rebated" a portion of their dues. ISTA found that $4.27 of its $160.00 dues was not chargeable to non-members. NEA determined that $4.51 of its normal $53.00 dues was not chargeable as part of a fair share representation fee.

two-fold. First, they contend that non-members may only be required to pay a fair share representation fee to the bargaining unit's exclusive representative. The argument continues, in essence, that MCEA alone was qualified to act as the exclusive representative. They assert that neither ISTA nor NEA were entitled to act in that capacity. Hence, they conclude, only the exclusive representative, MCEA, could demand a representation fee from non-members. This precise argument has been uniformly rejected by all courts which have considered it however.

We first must note that there is no question that MCEA alone was elected as the exclusive representative for the bargaining unit. In fact, no one has ever contended that either ISTA or NEA are co-exclusive representatives with MCEA. Contrary to appellants' arguments, however, it is clear that MCEA was elected exclusive representative in its status as an affiliate of both ISTA and NEA. The real issue then is whether a member of the bargaining unit, who has not joined the union, may be required to pay any representation fees to the exclusive representative's state or national affiliate organizations. We believe it clear that such fees can be demanded.

In the seminal case in this area of the law, *Abood v. Detroit Board of Education* (1977), 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261, the United States Supreme Court recognized the wide range of activities an exclusive representative may be called upon to perform. There, the Court stated:

> "The designation of a union as exclusive representative carries with it great responsibilities. The tasks

> of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. See, *Street*, 367 U.S., at 760, 81 S. Ct., at 1795. The services of lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel, may be required."

Abood, at 221, 97 S. Ct. at 1792, 52 L. Ed. 2d at 275. State and national organizations, particularly in the area of education, have traditionally supplied these and other services to assist their local affiliates in carrying out collective bargaining responsibilities. Such a network spreads the costs of acquiring these services, thus, facilitating collective bargaining activities even for the smaller bargaining units. If a local organization were required to employ its own staff of lawyers, expert negotiators, economists, and researchers, as the appellants' argument necessarily suggests, the costs of collective bargaining could quickly become prohibitive. We have found no support for such a result.

In a recent opinion of this court, *New Prairie Classroom Teachers Ass'n. v. Stewart* (filed January 22, 1986), Ind. App., No. 3-1184 A 330 (appeal after remand) (hereinafter referred to as *Stewart II*), authored by Judge Staton, we expressly rejected an argument identical to the one advanced by the appellants. *Stewart II*, Slip Op. at 4. Additionally, as Judge Staton pointed out in *Stewart II*, similar representation fee clauses in collective bargaining agreements requiring payments to both ISTA and NEA, previously have been upheld by this court. *See New Prairie Classroom Teachers Ass'n. v. Stewart* (1983), Ind. App., 460 N.E.2d 149, 151; *Fort Wayne Education Ass'n. v. Goetz* (1982), Ind. App., 443

N.E.2d 364, *trans. denied.* Other jurisdictions have also refused to recognize appellants' arguments. In *Cumero v. Public Employment Relations Board* (1985), 167 Cal. App. 3d 131, 213 Cal. Rptr. 326, *pet. for review granted* 215 Cal. Rptr. 852, 701 P.2d 1170, the California Court of Appeal rejected non-members' contentions that they could not be forced to pay a fair share representation fee to state or national affiliate organizations because they were not the exclusive representative of the bargaining unit. *Id.* at _____, 213 Cal. Rptr. at 338. The California court found that such a rule would seriously undermine the common practice of affiliation, a result for which the court found no support. Clearly, neither do we.

Appellants also have failed to justify the second prong of their attack on the representation fees MCEA sought for ISTA and NEA. This argument is essentially offered as an alternative to the first. They assert that if they are required to pay any monies to either ISTA or NEA, they should be required to pay only a pro rata portion of the costs actually expended by ISTA and NEA in assisting MCEA in carrying out its collective bargaining responsibilities with the School Corporation. They argue, in effect, that they should not be required to pay any costs expended by ISTA or NEA in providing collective bargaining services to *other* exclusive representatives. This view is far too narrow.

Judge Staton rejected this position in *Stewart II.* Slip Op. at 4. As we noted above, there are numerous services which an exclusive representative would need to employ in order to effectively fulfill its collective bargaining responsibilities. MCEA has chosen to pay fixed yearly fees to ISTA and NEA in return for continuous availability of a wide range of services. Certainly MCEA

could have determined that another method of acquiring these collective bargaining services was more advantageous. However, it did not. We perceive no basis which would permit non-members to force MCEA to abandon the approach it has selected as most effective, short of an election to oust MCEA as the bargaining unit's exclusive representative. Therefore, assuming that the fair share representation fees sought for ISTA and NEA are not otherwise objectionable, non-members may be required to pay them.

Issue Two

The second issue raised by appellants questions the amount of the fair share representation fee the trial court found them liable for. Appellants initially challenge the method employed by the trial court to calculate the representation fee. They assert that the trial court calculated the fee non-members were required to pay by subtracting the costs of political, ideological, organizing, and legal expenses unrelated to collective bargaining from the amount of dues members were required to pay. Appellants contend that the proper measure is MCEA's actual cost of bargaining, contract administration, grievance adjustment, and the performance of other statutory duties *vis-a-vis* the Monroe County School Corporation. They also challenge a number of specific expenditures which MCEA sought to include in the fair share representation fee. Because these two arguments are closely related, we discuss them together below.

It is clear that all employees in a bargaining unit who reap the benefits of an elected exclusive representative's collective bargaining efforts may be required to pay their fair share of the costs of those efforts. *Railway Employes'*

Dept. v. Hanson (1956), 351 U.S. 225, 238, 76 S. Ct. 714, 721, 100 L. Ed. 1112, 1134. Such a rule prevents "free riders"—those employees in the bargaining unit who would refuse to join the exclusive representative and yet enjoy the fruits of its collective bargaining activities. *Abood*, at 222, 97 S. Ct. at 1792-93, 52 L. Ed. 2d at 276. Those who have chosen not to join the exclusive representative may not be compelled, however, to support its political or ideological activities which are not germane to collective bargaining. *Abood*, at 235, 97 S. Ct. at 1799-1800, 52 L. Ed. 2d at 284; *Brotherhood of Railway and Steamship Clerks v. Allen* (1963), 373 U.S. 113, 122, 83 S. Ct. 1158, 1164, 10 L. Ed. 2d 235, 242; *International Ass'n of Machinists v. Street* (1961), 367 U.S. 740, 768-69, 81 S. Ct. 1784, 1800, 6 L. Ed. 2d 1141, 1161. The difficult problem comes in drawing the line between those expenses which are clearly germane to collective bargaining and hence assessable against non-members, and those expenses which are clearly for political or ideological purposes unrelated to collective bargaining and, therefore, not assessable. *Abood*, at 236, 97 S. Ct. at 1800, 52 L. Ed. 2d 285. This line may be even harder to define where, as is the case here, the employer is a governmental entity. *Id.*

Drawing upon its earlier decisions in *Street*, *Allen*, and *Abood*, the United States Supreme Court recently attempted to clarify further the line between assessable and non-assessable expenses. In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks* (1984), 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428, the court stated:

> "[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive

> representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."

Ellis, at _____, 104 S. Ct. at 1892, 80 L. Ed. 2d at 442.[4] The Ellis opinion also reaffirmed the Court's long standing position that the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members. *Ellis*, at _____, 104 S. Ct. at 1897, 80 L. Ed. 2d at 447-48, n.15. *See also Allen*, at 122, 83 S. Ct. at 1164, 10 L. Ed. 2d at 24. The Court quickly added, however, that, considering the difficult accounting problems which were likely to arise, mathematical exactitude could neither be expected nor required. *Ellis*, at _____, 104 S. Ct. at 1897, 80 L. Ed. 2d at 447-48, n.15 *quoting Allen*, at 122, 83 S. Ct. at 1163, 10 L. Ed. 2d at 241. With these basic parameters set, we now proceed to consider appellants' specific arguments.

Appellants proposed method of calculating the fair

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[4] *Ellis* involved judicial construction of the Railway Labor Act (RLA), 45 U.S.C. section 152, Eleventh (1981), which permits common carriers to enter into union shop agreements. *See Ellis*, at _____, 104 S. Ct. at 1887, 80 L. Ed. 2d at 436. However, it appears that the *Ellis* decision will have much broader application. *See Hudson v. Chicago Teachers Union* (7th Cir. 1984), 743 F.2d 1187, *cert. granted* (1985), _____ U.S. _____, 105 S. Ct. 2700, 88 L. Ed. 2d 39 (applying *Ellis* to union shop agreement between school board and teachers union).

share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses. *Allen*, at 121, 83 S. Ct. at 1163, 10 L. Ed. 2d at 241; *Street*, at 774-75, 81 S. Ct. at 1803, 6 L. Ed. 2d at 1164; *Stewart II*, Slip Op. at 6. The formulation was tacitly reaffirmed in *Ellis*. *See Ellis*, at _____, 104 S. Ct. at 1889-90, 80 L. Ed. 2d at 439; *Stewart II*, Slip Op. at 6. Appellants' reliance on *Hudson v. Chicago Teachers Union* (7th Cir. 1984), 743 F.2d 1187, *cert. granted* (1985), _____U.S. _____ , 105 S. Ct. 2700, 88 L. Ed. 2d 39, is misplaced. Nowhere in that opinion does the court suggest that appellants' proposed method of calculation is the appropriate one. *Stewart II*, Slip Op. at 6. If we were to adopt appellants' formulation, we would in effect be requiring the mathematical and accounting exactitude which the Supreme Court has ruled is neither to be required nor expected. *Ellis*, at _____, 104 S. Ct. at 1897, 80 L. Ed. 2d at 447-48, n.15 *quoting Allen*, at 122, 83 S. Ct. at 1163, 10 L. Ed. 2d at 241. *See also Stewart II*, Slip Op. at 6. Our own extensive review of the relevant authority reveals no support for appellants' proposed formulation.

We turn next then to a consideration of the specific expenditures challenged by the appellants. In so doing, we must be mindful of our limited scope of review. We presume that the trial court correctly applied the law and committed no error. It is the appellants' burden then to demonstrate reversible error. *Dicus v. Ripley County Bank*

(1984), Ind. App., 471 N.E.2d 1257, 1259, *trans. denied*; *Matter of VMS* (1983), Ind. App., 446 N.E.2d 632, 637. Where, as is the case here, the trial court enters specific findings of fact and conclusions of law, we will not set them aside unless they are clearly erroneous. *Litzelswope v. Mitchell* (1983), Ind. App., 451 N.E.2d 366, 369. The judgment controls as to any issue not covered by the findings and must be upheld if sustainable on any theory. *Baker v. Compton* (1983), Ind. App., 455 N.E.2d 382, 385. In reviewing the judgment, we will neither reweigh the evidence nor judge the credibility of the witnesses who provided it. Rather, we will consider only the evidence most favorable to the judgment together with all inferences which may be reasonably drawn therefrom. If, from this standpoint, there is evidence of probative value to support the trial court's judgment, it will not be disturbed. *Uebelhack Equipment, Inc. v. Garrett Brothers, Inc.* (1980), Ind. App., 408 N.E.2d 136, 138.

MCEA EXPENDITURES

ISTA and NEA CONVENTIONS

Appellants challenge certain expenditures incurred by MCEA in sending representatives to annual conventions and workshops held by its affiliate organizations, ISTA and NEA. As the Supreme Court pointed out in *Ellis*, however, such conventions are essential to the effective discharge of the exclusive representative's collective bargaining responsibilities. *Ellis*, at _____, 104 S. Ct. at 1892-93, 80 L. Ed. 2d at 442. It is at such meetings that exclusive representatives receive the training in leadership techniques, contract negotiation, and grievance procedures which benefit all teachers. Therefore, as the

Supreme Court concluded in *Ellis*, these expenses are clearly assessable against non-members. *Id.*

NEW LEADER DINNER

Appellants next attack expenses related to MCEA's annual "New Leader Dinner." This function was used to educate MCEA's building representatives in the terms of the collective bargaining agreement. The building representatives were then better equipped to assist all teachers in protecting their rights under the agreement on a day-to-day basis. Clearly, this is an assessable expense under the *Ellis* test.

NEW TEACHER LUNCHEON

MCEA held a luncheon each year for all new teachers. This luncheon permitted MCEA to inform the new teachers of their rights and obligations under the collective bargaining agreement. It is clear from the record that MCEA made no attempt to encourage new teachers attending the luncheon to join it. Thus, it is not an organizing expense of the type determined by *Ellis* to be non-assessable. *Ellis*, at _____, 104 S. Ct. 1894-95, 80 L. Ed. 2d at 444-45. We must conclude, rather, that the cost of the "New Teacher Luncheon" was assessable against non-members.

LOBBYING ACTIVITIES

Appellants also challenge two expenditures which can best be described as lobbying activities. First, appellants question an expenditure made by MCEA to send a representative to "Solidarity Day" in Washington, D.C. This was apparently a march on the Capitol by various groups, including NEA, to protest numerous cuts in fed-

eral spending for social programs. It appears from the record that the MCEA representative participated in the march to protest cuts in educational programs and the proposed dismantling of the Department of Education. Secondly, appellants take issue with an expenditure of funds by MCEA for its own lobbying efforts. MCEA's lobbying arm, the legislative committee, lobbied the Indiana General Assembly on such issues as "Operation Prime Time" and teacher retirement benefits. Challenges similar to those raised here by appellants, however, have already been rejected. *See e.g. Stewart II*, Slip Op. at 8.

The Supreme Court has provided little guidance in this area. The court's opinion in *Ellis* did not consider expenditures for lobbying activities. In its earlier *Abood* decision, however, the Court intimated that, where the employer is a governmental entity, a certain amount of the exclusive representative's lobbying expenses would be assessable against non-members. The Court stated:

> "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process."

Abood, at 236, 97 S. Ct. at 1800, 52 L. Ed. 2d at 285. Unfortunately, the Court did not have the issue of lobbying expenses directly before it and, therefore, did not ultimately resolve the issue.

Two recent federal circuit court of appeals decisions have, however, had occasion to consider lobbying expenses. *See Robinson v. State of New Jersey* (3d Cir.

1984), 741 F.2d 598, *cert. denied* (1985), ____ U.S. ____, 105 S. Ct. 1228, ____ L. Ed. 2d ____, (construing New Jersey statute); *Champion v. State of California* (9th Cir. 1984), 738 F.2d 1082, *cert. denied* (1985), ____ U.S. ____, 105 S. Ct. 1230, ____ L. Ed. 2d ____ (construing California statute). Both courts upheld the use of representation fees for lobbying activities against non-members First Amendment challenges. In each case, the courts recognized that traditional areas of collective bargaining are largely dependent on and sensitive to legislative action. *Robinson*, at 609; *Champion*, at 1086. The *Robinson* court concluded, therefore, that:

> "So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees."

Robinson, at 609. The same result is required here.

Under Indiana's Certificated Educational Employee Bargain Act (CEEBA),[5] the exclusive representative is required to negotiate salary, wages, hours, fringe benefits, and grievance procedures. Indiana Code section 20-7.5-1-4 (Burns 1985). It is also required to discuss a variety of subjects with the school employer including: working conditions; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size; and, budget appropriations. Indiana Code sec-

[5] *See* Indiana Code sections 20-7.5-1-1 to 20-7.5-1-14 (Burns 1985).

tion 20-7.5-1-5 (Burns 1985). State and federal legislative and executive actions directly impact on a number of these collective bargaining subjects. If an exclusive representative is to effectively perform its collective bargaining responsibilities for all teachers, it must be able to voice its opinions on actions that affect these subjects at both the state and federal levels.

Consequently, we must agree with the standard set out in *Robinson*. So long as lobbying activities are pertinent to the collective bargaining duties of the exclusive representative and are not merely for the purpose of advancing the political or ideological positions of the exclusive representative, they are properly assessable against non-members. Under such a standard, expenses for attending "Solidarity Day" to voice the exclusive representative's position on federal budget cuts in educational spending and expenses for lobbying the general assembly on "Prime Time" and teacher retirement benefits are clearly assessable. The trial court committed no error in requiring appellants to pay for these activities.

SOCIAL PROGRAMS

Certain social programs, including expenditures to honor retiring teachers, are also challenged by appellants. These activities were open to and benefited all teachers. Therefore, they are clearly assessable against non-members. *Ellis*, at _____, 104 S. Ct. at 1893, 80 L. Ed. 2d at 443.

PROFESSIONAL DEVELOPMENT

Appellants next attack expenditures by MCEA for professional development workshops.[6] These workshops

[6] Appellants have also challenged expenditures by MCEA's Human
(footnote continued)

were intended to improve the professional competence of all teachers. Thus, while such workshops are not central to collective bargaining, they are, like social activities, sufficiently related to it to justify assessment against non-members. *See Ellis*, at _____, 104 S. Ct. at 1893, 80 L. Ed. 2d at 443.

TREASURER'S ALLOWANCE

Also challenged by appellants is the assessment of a portion of the treasurer's allowance for the 1982-1983 school year. Appellants contend that 13.4% of the entries in MCEA's books for that school year were for non-assessable expenses. They would conclude, therefore, that 13.4% of the treasurer's allowance was not assessable against non-members. Appellants fail to consider the testimony given for MCEA substantiating its claim that it had no non-assessable expenditures during the 1982-1983 school year. From this evidence, the trial court could have properly concluded that the treasurer spent no appreciable amount of time on expenditures which would not be assessable against appellants. Therefore, assessment of the full treasurer's allowance was justified.

UNEXPLAINED EXPENSES

Finally, appellants argue that several relatively insignificant expenditures were not properly charged against non-members because MCEA failed to adequately demonstrate that they were sufficiently related to its collec-

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Relations Committee. MCEA offered testimony, however, that this committee provided financial assistance for any teacher wishing to attend workshops in their field. Record at 197-98. Therefore, the assessability of these expenses is controlled by our discussion of professional development expenses.

tive bargaining responsibilities. These expenses included the cost of floral arrangements, monies spent by the Public Relations Committee, and an unexplained check drawn on the secretary's account. Once again, however, appellants have ignored testimony presented by MCEA supporting its claim that all of its expenditures were assessable against non-members. This was sufficient evidence from which the trial court could properly conclude that these miscellaneous expenses were includable in the fair share representation fee.

ISTA AND NEA EXPENDITURES

Appellants also challenge that part of the representation fee which represents payments to ISTA and NEA. However, unlike their challenge to MCEA's expenditures, appellants arguments here do not question the assessability of any specific class of expenditure by either ISTA or NEA. Rather, they first contend that MCEA failed to adequately establish the extent to which ISTA and NEA assisted MCEA in collective bargaining. As we discussed above, this argument is based on an inappropriate method of calculation. Appellants also challenge the amount of fair share representation fee destined for ISTA and NEA. This is merely an invitation to reweigh the evidence which we will not do. The trial court's determination of the proper fair share representation fee is supported by sufficient evidence contained in the record.

Judgment of the trial court is affirmed.

ROBERTSON, P.J. and NEAL, J., concur.

APPENDIX B

ORDER OF THE SUPERIOR COURT FOR THE COUNTY OF MONROE, INDIANA

January 4, 1985

IN THE SUPERIOR COURT FOR
THE COUNTY OF MONROE
STATE OF INDIANA, DIVISION III

MONROE COUNTY EDUCATION ASSOCIATION, Plaintiff	)	
vs.	)	CAUSE NO. CV8308-053D
HELEN ABELS, et al., Defendants.	)	

ORDER

This cause came to be heard by the Court on October 22 and October 23, 1984, at which time the Plaintiff appeared by counsel, Richard J. Darko and Edward F. McCrea, and the Defendants appeared by counsel, David T. Bryant and Ronald L. Chapman. Witnesses were sworn and evidence heard. At the conclusion of the trial, the Court took the matter under advisement pending submission by the parties of written briefs, citations and proposed findings. The parties having submitted the same, the Court now issues its Findings of Facts and Conclusions of Law.

Findings of Fact

1. In *Hollingsworth v Monroe County Community School Corporation and Monroe County Education Association*, Cause No. 81C308 (Ind Circ. 1983), June 20, 1983, employees of the Monroe

County Community School Corporation (hereinafter MCCSC) who were members of the Bargaining Unit represented by the Monroe County Education Association (hereinafter MCEA) but not members of the MCEA, in the same currently enforceable Collective Bargaining Agreement, challenged the constitutionality of the representation fee provision. The Brown County Circuit Court held that the MCCSC had the authority to agree to the representation fee provisions in the Agreement and that the said provisions did not violate the U.S. or Indiana State Constitution and thus is binding upon the non-member teachers.

2. The MCEA, the exclusive representative of the school employees of the MCCSC, is affiliated with the Indiana State Teachers Association (hereinafter ISTA) and the National Education Association (NEA). A teacher may not join the MCEA without also joining the ISTA and the NEA. The MCEA was elected exclusive representative in its affiliated status.

3. The non-members of the MCEA are liable for a fair-share representation fee for the school years 1981-82 and 1982-83 for the costs related to collective bargaining, contract administration, grievance adjustment and its duties as exclusive bargaining representatives. These costs shall not include that portion of the fees for political and ideological activities unrelated to said costs. The scope of the fair-share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. The MCEA's affiliation with the

ISTA and with the NEA provides necessary and vital resources. Without its affiliation with the ISTA and the NEA, the MCEA could not meet its legal obligation without charging exorbitant fees to both members and non-members.

4. By a preponderance of the evidence, the Plaintiff has established it is entitled to recover from each Defendant the following:

   a. MCEA is entitled to Twenty Dollars ($20.00) per Defendant for its portion of the representation fee for the year 1981-82, and it is entitled to Twenty-two Dollars ($22.00) per Defendant for its portion of said fee for the year 1982-83. The MCEA has established that it expends its time and resources equally regardless of whether a teacher is full-time or part-time and is entitled to the same amount from both full-time and part-time teachers.

   b. ISTA is entitled to One Hundred Forty Dollars and Ninety-one Cents ($140.91) per full-time Defendant and Seventy Dollars and Forty-five Cents ($70.45) per part-time Defendant for its portions of the 1981-82 fee, and it is entitled to One Hundred Fifty-five Dollars and Seventy-three Cents ($155.73) per full-time Defendant and Seventy-seven Dollars and Eighty-six Cents ($77.86) per part-time Defendant for its portion of the 1982-83 fee.

   c. NEA is entitled to Forty-three Dollars and

Fifty-eight Cents ($43.58) per full-time Defendant and Twenty-one Dollars and Seventy-nine Cents ($21.79) per part-time Defendant for its portion of the 1981-82 fee, and it is entitled to Forty-eight Dollars and Forty-nine Cents ($48.49) per full-time Defendant and Twenty-four Dollars and Twenty-four Cents ($24.24) per part-time Defendant for its portion of the 1982-83 fee. Thus, the Plaintiff is entitled to recover from each full-time Defendant employed during 1981-82 and a total representation fee in the sum of Two Hundred Four Dollars and Forty-nine Cents ($204.49) and for those full-time Defendants employed during 1982-83 and an additional fee of Two Hundred Twenty-Six Dollars and Twenty-two Cents ($226.22). The Plaintiff is entitled to recover from each part-time Defendant employed during 1981-82 a total in the sum of One Hundred Twelve Dollars and Twenty-four Cents ($112.24) and for those part-time Defendants employed during 1982-83 an additional fee of One Hundred Twenty-four Dollars and Ten Cents ($124.10).

5. The Plaintiff has failed to establish its claim for prejudgment interest.

Conclusions of Law

1. The law is with the Plaintiff and against the Defendants.

2. The representation fee provision between the MCEA

and the MCCSC contained in the collective bargaining agreement between said parties is a constitutional, enforceable obligation by which the Plaintiff may collect a fair-share representation fee from non-members of its bargaining unit.

3. By a preponderance of the evidence, the Plaintiff has established the amount of the fair-share fee for the year 1981-82 assessable against each full-time Defendant to be in the sum of Two Hundred Four Dollars and Forty-nine Cents ($204.49) and for said year the amount assessable against each part-time Defendant to be in the sum of One Hundred Twelve Dollars and Twenty-four Cents ($112.24). The Plaintiff has established the amount of the fee for the year 1982-83 assessable against each full-time Defendant to be in the sum of Two Hundred Twenty-six Dollars and Twenty-two Cents ($226.22) and for said year the amount assessable against each part-time Defendant to be in the sum of One Hundred Twenty-four Dollars and Ten Cents ($124.10).

IT IS THEREFORE CONSIDERED ORDERED ADJUDGED AND DECREED that the Plaintiff have and recover each of the above captioned amounts in the sum of Two Hundred Four Dollars and Forty-nine Cents ($204.49) per full-time Defendant and One Hundred Twelve Dollars and Twenty-four Cents ($112.24) per part-time Defendant for the year 1981-82, and Two Hundred Twenty-six Dollars and Twenty-two Cents ($226.22) per full-time Defendant and One Hundred Twenty-four Dollars and Ten Cents ($124.10) per part-

time Defendant for the year 1982-83, plus the costs of this action.

SO ORDERED this 4th January, 1985.

/s/

JOHN G. BAKER, JUDGE
Monroe Superior Court
Division III

APPENDIX C

DECISION OF THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT, DENYING PETITION FOR REHEARING

March 31, 1986

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

HELEN ABELS, et al., Defendants-Appellants,	)	
vs.	)	No. 1-385 A 66
MONROE COUNTY EDUCATION ASSOCIATION, Plaintiff-Appellee.	)	Date filed: March 31, 1986

APPEAL FROM THE MONROE SUPERIOR COURT
The Honorable John G. Baker, Judge
Cause Nos. CV 8308-053 D, CV 8308-052 D

RATLIFF, J.

ON PETITION FOR REHEARING

On February 18, 1986, this court handed down its opinion in *Abels v. Monroe County Education Ass'n.* (filed February 18, 1986), Ind. App. No. 1-385 A 66, affirming the Monroe Superior Court's calculation of the fair share representation fee nonmembers were required to pay to the bargaining unit's exclusive representative. Appellants have now filed a petition for rehearing which sets forth several grounds for rehearing. Although we deny rehearing, we feel compelled to discuss briefly one of those grounds.

In their citation to additional authority, Appellants refer us to a recent United States Supreme Court case, *Chicago Teachers Union v. Hudson* (U.S. March 4, 1986), No. 84-1503, 53 U.S.L.W. 4231. There, the court

struck down certain internal union procedures for dealing with nonmembers' objections to fair share representation fees, holding that:

> "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

Chicago Teachers Union, 54 U.S.L.W. at 4236. Appellant's reliance on this case is misplaced.

Appellants have not, either in the trial court or on appeal here, challenged the procedures employed by the Monroe County Education Ass'n. to collect the fair share representation fees. Rather their action attacked the actual calculation of the fair share representation fee due the union. *Chicago Teachers Union* does not address this issue. While this court is clearly bound to apply the constitutional limitations announced in *Chicago Teachers Union* where internal union procedures for the collection of fair share representation fees are challenged, that issue is not now before us. We need not, therefore, apply those limitations in this case. But see *New Prairie Classroom Teachers v. Stewart* (1986), Ind. App., 487 N.E.2d 1324, 1328-29, (rehearing pending) (where this issue is discussed briefly). As we held in our earlier opinion, the trial court correctly calculated the fair share representation fee due the Monroe County Education Ass'n. from appellants.

Appellants Petition for Rehearing is, therefore, denied.

ROBERTSON, P.J. and NEAL, J., concur.

APPENDIX D

NOTICE OF THE SUPREME COURT OF INDIANA DENYING PETITION FOR TRANSFER

July 14, 1986

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 1-385A660

Helen Abels et al v. Monroe County Education Assoc. et al

You are hereby notified that the Supreme Court

has on this day Appellants petition for Transfer is hereby DENIED. Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said court,

this 14 day of July , 1986

/s/
Clerk Supreme Court and Court of Appeals

Supreme Court, U.S.
FILED
FEB 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HELEN ABELS, *et al.*,
Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decision of the Court of Appeals of Indiana, which held that there was sufficient evidence in the record to justify the representation [*i.e.*, agency] fees that petitioners were ordered to pay to their exclusive collective bargaining representative, respondent Monroe County Education Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-603

HELEN ABELS, *et al.*,
Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Monroe County Education Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition.

STATEMENT OF THE CASE

Pursuant to Indiana's Certificated Educational Employee Bargaining Act, Ind. Code § 20-7.5-1-1 *et seq.*, respondent Monroe County Education Association ("MCEA") has been recognized as the exclusive representative for a bargaining unit consisting of the teachers employed by the Monroe County Community School Corporation ("School Corporation"). Petitioners are fifty-

four teachers who were employed by the School Corporation during the 1981-82 and 1982-83 school years, and therefore were members of the MCEA bargaining unit.

In its capacity as exclusive representative, MCEA entered into a collective bargaining agreement with the School Corporation covering the period from August 1, 1981 through July 31, 1983. As permitted by Indiana law, that agreement included a representation fee provision [1]—*i.e.*, a provision that required bargaining unit employees who chose not to join MCEA "to pay a Representation Fee to the Association, including the Indiana State Teachers Association and the National Education Association." Appendix to Petition ("App.") 2a. The Indiana State Teachers Association ("ISTA") and the National Education Association ("NEA") are, respectively, MCEA's state and national parent organizations. As part of its affiliation relationship with ISTA and NEA, MCEA has a "unified" membership structure, which means that a teacher may not become a member of MCEA without also joining, and paying dues to, ISTA and NEA. App. 5a, 20a. The collective bargaining agreement further provided that no feepayer "should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and griev-

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[1] *See New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983), *transfer denied* (Indiana Supreme Court, Oct. 18, 1983) (holding that a similar representation fee agreement between an exclusive bargaining representative and a school board "was authorized by law, constitutional, and binding upon non-member teachers"); *Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E. 2d 364 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983).

In their Petition for a Writ of Certiorari, petitioners do not—and could not—challenge the basic constitutionality of collecting representation fees from nonmember employees. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

ance adjustment, or unrelated to its duties as exclusive bargaining representative." App. 2a.

This representation fee provision was not of the classic variety. Unlike the typical arrangement—pursuant to which the fee automatically is deducted from the nonmember employee's salary, or payment is made a condition of employment for which a noncomplying employee may be terminated—MCEA could enforce this contractual obligation only by suing to recover the amount of any unpaid fees.[2] Accordingly, when petitioners refused to pay their representation fees for the 1981-82 and 1982-83 school years, MCEA filed this lawsuit against them in the Superior Court of Monroe County.[3]

A bench trial was held on October 22 and October 23, 1984. Six witnesses testified on behalf of MCEA. These witnesses described in detail, with appropriate documentation, the activities engaged in by MCEA, ISTA, and NEA during the 1981-82 and 1982-83 school years; the amounts expended for each of these activities; and the specific relationship between these expenditures and the duties performed by MCEA as the exclusive representative.[4] In addition to presenting evidence regarding the

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[2] The Indiana courts have held that it would violate state law to make payment of a representation fee a condition of employment enforceable by termination. *See Anderson Federation of Teachers, Local 519 v. Alexander*, 416 N.E.2d 1327 (Ind. App. 1981).

[3] An earlier lawsuit, filed as a class action by one of the petitioners, already had determined that the particular representation fee provision included in the collective bargaining agreement between MCEA and the School Corporation was "constitutional and does not violate the . . . freedom of expression and other rights protected by the First and Fourteenth Amendments of the United States Constitution." *Hollingsworth v. Monroe County Community School Corporation and Monroe County Education Association*, No. 81C303, Slip op. at 3 (Brown County Circuit Court, June 20, 1983). That decision was not appealed.

[4] These duties included, *inter alia*, bargaining with the School Corporation over "salary, wages, hours, and salary and wage related

expenditures made by MCEA, ISTA, and NEA for activities that were *included* in computing the representation fees that were sought from petitioners, MCEA also presented evidence regarding those expenditures that it had excluded from the representation fees because it did not consider them to be sufficiently related to collective bargaining.

After reviewing the evidence presented at trial, and the briefs that were filed by the parties, the trial court issued its opinion on January 4, 1985. The court began by declaring that:

> The non-members of the MCEA are liable for a fair-share representation fee for the school years 1981-82 and 1982-83 for the costs related to collective bargaining, contract administration, grievance adjustment and its duties as exclusive bargaining representativ[e]. These costs shall not include that portion of the fees for political and ideological activities unrelated to said costs. The scope of the fair-share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. The MCEA's affiliation with the ISTA and with the NEA provides necessary and vital resources. Without its affiliation with the ISTA and the NEA, the MCEA could not meet its legal obligation without charging exorbitant fees to both members and non-members. App. 20a-21a.

The court then held that each petitioner was liable to MCEA for two representation fees, one covering the

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fringe benefits," Ind. Code. § 20-7.5-1-4; engaging in discussions with the school district concerning "working conditions, other than [salary, wages, hours, and fringe benefits]; curriculum development and revision; textbook selection; teaching methods; selection, assignment, or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations," *id.* § 20-7.5-1-5; and processing grievances against the School Corporation pursuant to the negotiated grievance arbitration provision, *id.* § 20-7.5-1-4.

1981-82 school year and the other covering the 1982-83 school year. Specifically, the court found:

> By a preponderance of the evidence, the Plaintiff [*i.e.*, MCEA] has established the amount of the fair-share fee for the year 1981-82 assessable against each full-time Defendant to be in the sum of Two Hundred Four Dollars and Forty-nine Cents ($204.49) and for said year the amount assessable against each part-time Defendant to be in the sum of One Hundred Twelve Dollars and Twenty-four Cents ($112.24). The Plaintiff has established the amount of the fee for the year 1982-83 assessable against each full-time Defendant to be in the sum of Two Hundred Twenty-six Dollars and Twenty-two Cents ($226.22) and for said year the amount assessable against each part-time Defendant to be in the sum of One Hundred Twenty-four Dollars and Ten Cents ($124.10). App. 23a.

The 1981-82 representation fee for full-time teachers was comprised of $20.00 for MCEA, $140.91 for ISTA, and $43.58 for NEA. For the 1982-83 school year, these amounts increased to $22.00 for MCEA, $155.73 for ISTA, and $48.49 for NEA. App. 21a-22a.

Petitioners appealed these monetary judgments to the Court of Appeals of Indiana, raising several issues that were consolidated by that court into two questions: (1) whether the trial court erred in calculating the representation fees; and (2) whether the representation fees should include payments to ISTA and NEA. *See* App. 4a.

On the first issue, the Court of Appeals set forth the applicable standard for determining whether expenses are chargeable to employees who refuse to join the exclusive representative by quoting at length from this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984):

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive

> representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. App. 9a-10a (quoting *Ellis, supra*, 466 U.S. at 448).

Furthermore, consistent with prior decisions of this Court and the Indiana courts, the Court of Appeals expressly stated that "the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members." App. 10a. *See New Prairie Classroom Teachers Association v. Stewart*, 487 N.E.2d 1324, 1329 (Ind. App. 1986), *transfer denied* (Indiana Supreme Court, July 7, 1986) (the exclusive representative "must prove the proportion of [its] total expenditures which were chargeable to objecting employees"), *petition for cert. filed*, 55 U.S.L.W. 3296 (U.S. Oct. 6, 1986) (No. 86-554); *Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364, 373 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983) ("the burden [is] upon the Association to show nonpolitical use of the funds").

Applying the foregoing standards to the record before it, the Court of Appeals concluded that MCEA had met its burden of proof. Specifically rejecting petitioners' argument that certain expenditures that were made by MCEA or its affiliated organizations and that were included in the representation fees were not properly chargeable to objecting feepayers,[5] the court concluded

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[5] Among those expenditures addressed directly by the Court of Appeals were the costs incurred by MCEA in sending representa-

that "[t]he trial court's determination of the proper fair share representation fee is supported by sufficient evidence contained in the record." App. 18a.

With regard to the second issue raised on appeal—whether the representation fees should include payments to ISTA and NEA—the Court of Appeals also found sufficient evidence in the record to support the trial court's judgment. After first observing that "it is clear that MCEA was elected exclusive representative in its status as an affiliate of both ISTA and NEA," App. 5a, the court turned its attention to whether members of the bargaining unit represented by MCEA "may be required to pay any representation fees to the exclusive representative's state or national affiliate organizations," App. 5a. On this issue, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting feepayers. As the court explained:

> In the seminal case in this area of the law, *Abood v. Detroit Board of Education*, [431 U.S. 209 (1977)], the United States Supreme Court recognized the wide range of activities an exclusive representative may be called upon to perform. There, the Court stated:
>
> > "The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling dis-

---

tives to annual conventions and workshops of ISTA and NEA, App. 12a-13a; the expenses related to MCEA's annual luncheon for all new teachers, App. 13a; the costs of MCEA's lobbying governmental agencies on matters germane to its duties as exclusive representative, App. 13a-16a; the expenses incurred by MCEA for certain social programs, App. 16a; and MCEA's expenditures related to various professional development workshops, App. 16a-17a. In this Court, petitioners "abandon[] their claim that certain of MCEA's expenditures are not chargeable to them." Petition at 8-9.

> putes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See* [*Machinists v.*] *Street*, 367 U.S. [740, 760 (1961)]. The services of lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel, may be required."

Abood, [431 U.S. at 221]. State and national organizations, particularly in the area of education, have traditionally supplied these and other services to assist their local affiliates in carrying out collective bargaining responsibilities. Such a network spreads the costs of acquiring these services, thus, facilitating collective bargaining activities even for the smaller bargaining units. If a local organization were required to employ its own staff of lawyers, expert negotiators, economists, and researchers, as the [petitioners'] argument necessarily suggests, the costs of collective bargaining could quickly become prohibitive. We have found no support for such a result. App. 5a-6a.

With specific regard to the services provided to MCEA by ISTA and NEA, the Court of Appeals stated:

> As we noted above, there are numerous services which an exclusive representative would need to employ in order to effectively fulfill its collective bargaining responsibilities. MCEA has chosen to pay fixed yearly fees to ISTA and NEA in return for continuous availability of a wide range of services. Certainly MCEA could have determined that another method of acquiring these collective bargaining services was more advantageous. However, it did not. We perceive no basis which would permit non-members to force MCEA to abandon the approach it has selected as most effective, short of an election to oust MCEA as the bargaining unit's exclusive representative. Therefore, assuming that the fair share representation fees sought for ISTA and NEA are not otherwise objectionable, non-members may be required to pay them. App. 7a-8a.

Finally, the court turned directly to petitioners' "challenge [to] the amount of fair share representation fee[s] destined for ISTA and NEA." App. 18a. The court concluded that this challenge was "merely an invitation to reweigh the evidence" which, the court held, "we will not do." App. 18a.

Petitioners' motion for rehearing was denied, and the Supreme Court of Indiana refused to review the decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners challenge the ruling of the Court of Appeals of Indiana on two grounds: they claim initially that the method used by the court to calculate the amount of the representation fees was incorrect; and they claim, in addition, that the court erred when it included in the representation fees amounts to be paid to ISTA and NEA. As we shall demonstrate, petitioners' first claim is based upon a mischaracterization of the decision of the Court of Appeals, and their second claim relates to conclusions reached by that court with regard to the sufficiency of the evidence presented in the trial court. Neither of these claims presents a question that warrants further review by this Court.

I. THE CONCLUSION OF THE COURT OF APPEALS OF INDIANA THAT MCEA HAD PRESENTED SUFFICIENT EVIDENCE OF ITS CHARGEABLE EXPENDITURES TO JUSTIFY THE REPRESENTATION FEES AWARDED BY THE TRIAL COURT DOES NOT WARRANT REVIEW BY THIS COURT

The first of the two Questions Presented in the Petition for Certiorari is as follows:

> WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE, IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:

A. A Pro Rata Share Of The Proven Costs of Collective Bargaining; or

B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

The clear implication to be drawn from this question is that the Court of Appeals based its affirmance of the representation fees awarded by the trial court on a "dues-less-rebate" approach. This is not in fact so. Consistent with the decisions of this Court and the courts of Indiana, the Court of Appeals required "the exclusive representative [to] bea[r] the burden of establishing, by a preponderance of the evidence, what proportion of [its] expenditures were properly assessable against non-members." App. 10a.

This Court's decisions establish that it is constitutional to require bargaining unit employees, over their objection, to support union activities that are related to collective bargaining. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. ——, 106 S. Ct. 1066, 1069 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-32 (1977). It is equally well-established that, once a representation fee is challenged by a nonmember employee, the union has the burden of proving the appropriate fee amount: " 'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.' " *Abood, supra*, 431 U.S. at 239-40 n.40 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)), *quoted in Hudson, supra*, 106 S. Ct. at 1075.

Last Term, in *Hudson, supra*, this Court provided further guidance with regard to the nature of this burden. The Court in *Hudson* stated that a union could not simply "identif[y] the amount that it admittedly had expended for purposes that did not benefit dissenting non-

members," and then charge nonmembers a fee based upon the remaining percentage of total expenditures. 106 S. Ct. at 1076. Rather, a union that seeks to collect representation fees from nonmembers has the burden of "identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.*[6]

Despite petitioners' protestations to the contrary, *see* Petition at 14-16, this is precisely the burden of proof that MCEA was required to, and did in fact, meet in this case. As described more fully in the Statement of the Case, *supra* at 5-7, the Court of Appeals expressly stated that the exclusive representative "bears the burden of establishing, by a preponderance of the evidence, what proportion of [its] expenditures were properly assessable against non-members," App. 10a, and it was based on this standard that the court concluded that there was sufficient evidence in the record to support the trial court's judgment that MCEA was entitled to representation fees from the petitioners. Moreover, this was not a new ap-

[6] For purposes of argument, we assume in this brief that this requirement applies to the collection of representation fees by exclusive representatives in Indiana, and demonstrate that MCEA in fact complied with this requirement. It is important to note, however, that the Court in *Hudson* was dealing with the totally different situation in which a union seeks to collect and expend representation fees *before* an impartial determination has been made as to the allowable amount of the fee. In such circumstances, the Court indicated that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to guage the propriety of the union's fee." 106 S. Ct. at 1076. This rationale is not applicable in Indiana: there is no risk to a nonmember employee's First Amendment rights, inasmuch as state law prohibits the involuntary collection of representation fees from public school teachers, by payroll deduction or otherwise, unless and until there has been a final court judgment against the teachers awarding a specified representation fee to their exclusive representative.

proach for the Indiana courts. In previously upholding the imposition of representation fees under Indiana law, the Court of Appeals had concluded that exclusive representatives "must prove the proportion of their total expenditures which [are] chargeable to objecting employees," *Stewart*, *supra*, 487 N.E.2d at 1329, and that "the burden [is] upon the Association to show nonpolitical use of the funds," *Goetz*, *supra*, 443 N.E.2d at 373. In short, the holding of the Court of Appeals is fully consistent with this Court's agency fee decisions, including its decision in *Hudson*.

To be sure, in the course of its decision the Court of Appeals noted that the amount of the representation fees awarded by the trial court was less than the amount of dues charged to members of MCEA, and that this reduction "reflect[ed] the dues each organization charges its members less a 'rebate' for political, ideological, and organizational expenses unrelated to collective bargaining activities." *See* App. 3a n.2, 4a n.3. With this language, however, the court plainly did not mean to suggest that MCEA had failed to meet its burden of proving chargeable expenditures, for that would have been flatly inconsistent both with its own statement that MCEA "bears the burden of establishing, by a preponderance of the evidence, what proportion of [its] expenditures were properly assessable against non-members," App. 10a, and with established Indiana law on the subject, *see Stewart*, *supra*, 487 N.E.2d at 1329; *Goetz*, *supra*, 443 N.E.2d at 373. Rather, this statement merely reflected the fact that, during the trial, MCEA did more than was required: it not only proved chargeable expenditures, but also identified those expenditures which could not be included in the representation fees.[7]

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[7] There is one other paragraph in the Court of Appeals' opinion that, on its face, may appear inconsistent with this Court's decision in *Hudson*. *See* App. 11a. Because there was sufficient evidence in the record with regard to MCEA's chargeable expenditures to sup-

Petitioners' assertion that the Court of Appeals based the representation fees on "Union Dues Less a Union-Determined Rebate Amount," Petition at i, rather than on proof of MCEA's chargeable expenditures, reflects a total misunderstanding of the role that membership dues played in the court's calculation of the fees. The dues were not used by the court to alter in any way the requirement that "the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of [its] expenditures were properly assessable against non-members." App. 10a. Indeed, the Court of Appeals in this case expressly concluded that "[t]he trial court's determination of the proper fair share representation fee is supported by sufficient evidence contained in the record." App. 18a. It was only *after* that requirement had been satisfied that dues were used as a benchmark against which to calculate the allowable representation fees. Simply stated, once sufficient evidence had been introduced to establish the percentage of the total expenditures of MCEA, ISTA, and NEA that were " 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative,' " App. 9a-10a (quoting *Ellis, supra*, 466 U.S. at 448), the court applied that percentage to the dues charged to MCEA members to determine the amount of the representation fees.

This use of dues as the final step in the representation fee calculation process finds ample support in the decisions of this Court, *see, e.g., Abood, supra*, 431 U.S. at 238 (citing *Machinists v. Street*, 367 U.S. 740, 774-75 (1961), for remedy of "restitution of a fraction of union

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port the trial court's judgment, however, this paragraph was completely unnecessary to the Court of Appeals' holding and therefore cannot provide the basis for review by this Court. *See Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (this Court "reviews judgments, not statements in opinions"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) (same).

dues paid equal to the fraction of total union expenditures that were made for political purposes"), and is in accord with the approach taken in various statutes authorizing the collection of representation fees, *see, e.g.*, 45 U.S.C. § 152, Eleventh (Railway Labor Act provision linking involuntary membership fees to dues); Mich. Comp. Laws § 423.210(1)(c) (providing that representation fees for Michigan public employees may be "equivalent to the amount of dues uniformly required of members"); N.J.S.A. 34:13A-5.5(b) (providing that representation fees for New Jersey public employees may not "exceed 85% of the regular membership dues").

Petitioners contend that *Hudson* supports their position, but they are mistaken. There is nothing in that decision that disallows a cross-reference to dues for purposes of calculation *after* a union has, as MCEA did here, proven the percentage of its total expenditures that is chargeable to nonmembers. Although a union's total expenditures may not in each and every year be precisely the same as its total dues income, the Court in *Hudson* obviously intended to allow for this type of minimal discrepancy when it reaffirmed that "'[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" 106 S. Ct. at 1076 n.18 (quoting *Allen, supra*, 373 U.S. at 122, and *Abood, supra*, 431 U.S. at 239-40 n.40). Indeed, both the Court of Appeals and the Supreme Court of Indiana specifically considered the propriety of MCEA's representation fees in light of *Hudson*. Thus, petitioners emphasized the alleged conflict between the decision in this case and the March 4, 1986 decision in *Hudson* when filing their motion for rehearing in the Court of Appeals and their petition to transfer the case to the Supreme Court of Indiana. After specifically noting that it "is clearly bound to apply the constitutional limitations announced in" *Hudson*, App. 26a, the Court of Appeals denied petitioners' request for rehearing on March 26, 1986. And subsequently, on

July 14, 1986, the Supreme Court of Indiana summarily denied petitioners' request to transfer the case to that court. App. 27a.[8]

In short, the first Question Presented in the Petition for Certiorari is based on a mischaracterization of the decision of the Court of Appeals of Indiana, and therefore cannot properly provide the basis for review by this Court.

II. THE CONCLUSION OF THE COURT OF APPEALS THAT THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO INCLUDE PAYMENTS TO ISTA AND NEA IN THE REPRESENTATION FEES DOES NOT WARRANT REVIEW BY THIS COURT

Petitioners do not contend that "amounts spent by ISTA and NEA in support of collective bargaining activities by MCEA are not chargeable to nonmembers." Petition at 23. To the contrary, petitioners concede that, "if proved, they could be charged a pro rata share of such costs." *Id.* *See Hudson, supra,* 106 S. Ct. at 1076 n.18

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[8] Petitioners also seek to demonstrate that the representation fees were excessive by comparing total expenditures by MCEA, ISTA, and NEA for the 1981-82 and 1982-83 school years with the number of employees in MCEA's bargaining unit and the number of potential ISTA and NEA members during those years. *See* Petition at 4-6. Even assuming, *arguendo,* that petitioners correctly state the number of employees represented and dollars expended, these numbers are explained by the annual fluctuations that are inherent in any union's budgetary process. Despite these fluctuations, unions almost invariably choose to assess a flat rate of dues on their members, rather than constantly changing their dues structure to account for annual variations in expenditures. The same administrative latitude surely must be available for representation fees. *Cf. Hudson, supra,* 106 S. Ct. at 1076 n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year"). Indeed, the record in this case shows that MCEA's total expenditures in certain years (including 1981-82) actually exceeded its total revenue from dues, and the carryover from other years (including 1982-83), in which the reverse was true, was used to cover the shortfall.

(indicating that, upon proper showing, a union's payments "to its affiliated state and national labor organizations" may be included in a representation fee). What petitioners do contend is that the Court of Appeals erred when it included payments to ISTA and NEA in the representation fees "because MCEA presented no evidence of actual expenditures by its affiliates for the petitioners' bargaining unit, [and therefore] MCEA failed to carry its burden of proof." Petition at 23.

Although this contention simply disregards the record in this case,[9] we oppose petitioners' request for review on a more basic ground. Their argument relates solely to conclusions reached by the Court of Appeals with

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[9] As explained more fully in the Statement of the Case, *supra* at 4, 7-9, the trial court found ample evidence in the record to demonstrate that ISTA and NEA provided "necessary and vital resources" to MCEA, without which MCEA "could not meet its legal obligation" to employees in the bargaining unit. App. 21a. Similarly, the Court of Appeals concluded that "there are numerous services which an exclusive representative would need to employ in order to effectively fulfill its collective bargaining responsibilities. MCEA has chosen to pay fixed yearly fees to ISTA and NEA in return for continuous availability of a wide range of services. Certainly MCEA could have determined that another method of acquiring these collective bargaining services was more advantageous. However, it did not." App. 7a-8a. As succinctly summarized by the Court of Appeals:

> State and national organizations, particularly in the area of education, have traditionally supplied [the "services of lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel"] to assist their local affiliates in carrying out collective bargaining responsibilities. Such a network spreads the costs of acquiring these services, thus, facilitating collective bargaining activities even for the smaller bargaining units. If a local organization were required to employ its own staff of lawyers, expert negotiators, economists, and researchers, as the [petitioners'] argument necessarily suggests, the costs of collective bargaining could quickly become prohibitive. We have found no support for such a result. App. 6a (quoting *Abood, supra*, 431 U.S. at 221).

regard to the sufficiency of the evidence presented in the trial court. When all is said and done, petitioners simply disagree with the holding of the Court of Appeals that:

> [Petitioners'] . . . challenge [to] the amount of fair share representation fee[s] destined for ISTA and NEA . . . is merely an invitation to reweigh the evidence which we will not do. App. 18a.

This disagreement concerning the sufficiency of evidence in the record clearly does not present a question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HELEN ABELS, *et al.*,

Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE OPPOSITION MISREPRESENTS THE ISSUES RAISED BY THE PETITION AND BY THE RECORD.

Initially, the respondent argues that the first question presented by the petitioners is based on a mischaracterization of the decision of the Indiana Court of Appeals and therefore it cannot provide the basis for review by this Court. However, it is the respondent that has mischaracterized the decision below.

Based upon the respondent's presentation the Indiana Court of Appeals affirmed a determination that the petitioners had to pay a fee equal to union dues less the

respondent's self-determined rebate. Specifically, the court said:

> Appellants proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses. (Citations omitted.)

App. 10a-11a. The first question presented asks whether the First Amendment permits this method of calculation or whether an agency fee must be based on a pro rata share of the proven costs of collective bargaining.

The record below clearly shows that a pro rata share is much less than the dues-less-rebate figure approved by the Indiana Court of Appeals. Thus, the First Amendment violation which is caused by the decision below is apparent.

The simple question—how do you calculate an agency fee—is fundamental, and the answer affects every agency fee payer in the country in both the public and the private sectors. The court below misinterpreted this Court's agency fee decisions in *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S. Ct. 1066 (1986), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), and reached the wrong answer. The need for further guidance from this Court in this sensi-

tive area impacting on First Amendment interests is clear. The petition should be granted in order to provide the lower courts with guidance that is obviously necessary.

II. THIS COURT IS NOT BEING ASKED TO REVIEW THE FACTUAL DETERMINATIONS OF THE COURT BELOW.

Respondent argues that the second question really involves a mere disagreement with the factual conclusions reached by the court below and that in raising it the petitioners disregard the record in the case. Apparently, the respondent does not perceive the issue.

Petitioners contend that before fees for affiliated organizations may be awarded, it must be shown that the expenses were incurred on behalf of petitioners' bargaining unit. The record below is clear that no proof was offered as to how much money either ISTA or NEA spent in providing services to the exclusive representative in this case. Petitioners argue, then, as a matter of law, that that failure is fatal to the claim for fees for the affiliated organizations. This Court has indicated that such proof is required. *Ellis*, 466 U.S. at 448, 453; *and see* petition at pp. 16-23. The absence of proof of the costs entailed in providing collective bargaining services to the unit to which the petitioners belong is fatal to the claim for fees for ISTA and NEA.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition the Court should grant the petition and set the case down for plenary briefing and argument.

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